Office - Supreme Court, U. S.
FILED
NOV 27 1953
HAROLD B. WILLEY, Clerk

10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 482

HARVEY RADIO LABORATORIES, INC.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

BOLLING R. POWELL, JR.,
Counsel for the Petitioner.

INDEX

Subject Index

	Page
Petition for a writ of certiorari	1
Jurisdiction	1
Questions presented	1
Statement of the facts	2
Specifications of the errors to be urged	3
Reasons for granting the writ	4
Brief in support of the petition for a writ of certiorari	6
Argument	6
The rule established by the Supreme Court in the long line of decisions herein cited, that the defense of equitable estoppel in an action at law is not available to a party unless he has been induced by the other party to change his position to his prejudice, is applicable to the instant case, and the Court of Claims erred in not recognizing this principle	6
The finding of ultimate fact by the Court of Claims that plaintiff engaged in negotiations for the reduction of the contract price is without supporting evidence and in conflict with its other findings	9
Conclusion	13

Table of Cases Cited

Arizona v. *Copper Queen Mining Company*, 233 U.S. 87	5
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	5
Bloomsfield v. *Charter Oak Bank*, 121 U.S. 121	5, 7
Deitrick v. *Greaney*, 309 U.S. 190	5
Dickerson v. *Colgrove*, 100 U.S. 578	5, 7
Gregg v. *Von Phul*, 1 Wall. 274	5
Insurance Company v. *Wilkinson*, 80 U.S. 222	5

Page

Jones v. *United States*, 96 U.S. 24 ..... 5, 7
Ketchum v. *Duncan*, 96 U.S. 659 5
Kirk v. *Hamilton*, 102 U.S. 68 5
Leather Manufacturing Bank v. *Morgan*, 117 U.S. 97 ..... 5, 7
Pierce v. *United States*, 7 Wall. 666, 75 L. ed 169 8
Railroad Company v. *DuBois*, 79 U.S. 47 5
Simmons v. *Burlington, Cedar Rapids and Northern Railway Company*, 159 U.S. 278 9
Wehrman v. *Conklin*, 155 U.S. 314 9
Wiser v. *Lawler*, 189 U.S. 260 5

STATUTES AND OTHER AUTHORITIES CITED

Bigelow on Estoppel, Sixth Edition, Page 694 8
Pomeroy's Equity Jurisprudence, Fourth Edition, Volume 2, Section 812 8
United States Code, Title 28, Section 1255(1) 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 482

HARVEY RADIO LABORATORIES, INC.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above cause on October 6, 1953 (R. 47-57).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C., § 1255(1).

Questions Presented

1. Whether the Court of Claims has erroneously failed to give proper effect to applicable decisions of this Court and has rendered a decision in conflict therewith in holding, as a matter of law, that the defense of equitable estoppel was available to the defendant in this case, even though it

found as an ultimate fact that plaintiff in no way induced any action or non-action or change of position on the part of defendant.

2. Whether the Court of Claims' finding of the ultimate fact that plaintiff engaged in negotiations for the revision of the price of the contract in suit is arbitrary and capricious, in that this finding of ultimate fact is unsupported by any evidence, as is shown by the testimony and exhibits disclosed in its findings, and is in conflict with other findings of ultimate fact.

Statement of the Facts

This is an action at law on a contract to recover the unpaid balance of the contract price. The contract (ac 76) was entered into between the plaintiff and the United States for the production of electronic gear. This contract provided for a total contract price of $1,146,780.54. It has been stipulated that the unpaid balance of the contract price is $188,325.83.

Article 40 of the contract required the plaintiff to submit to the Contracting Officer, within sixty days after completion of the contract, a detailed statement of the costs of performing the contract. Both the Court and the Commissioner have found that the plaintiff satisfactorily completed the contract and submitted its detailed statement of costs in accord with this requirement.

Article 40 further provided that "Upon written demand of the Contracting Officer, made at any time within thirty days after the submission of such statement, the Contractor will negotiate to reduce the contract price to an amount representing fair and reasonable compensation for the performance of the contract" (R. 63). Both the Court and the Commissioner have found that the Contracting Officer did not, either within thirty days or at any other time after the submission of plaintiff's statement of costs

on November 24, 1948, make written demand that plaintiff negotiate to reduce the contract price (R. 73). The Court of Claims properly held that "The making of such a demand was a condition precedent to plaintiff's obligation to negotiate" to reduce the contract price, and that "As a general rule, conditions precedent must be exactly fulfilled, or no liability can arise on the promise which such conditions qualify" (R. 54).

However, the Court of Claims erroneously held that notwithstanding the failure of the Contracting Officer to perform this condition precedent, the plaintiff cannot recover the unpaid balance of the contract price because between December 25, 1948, the date on which the thirty days expired for the making of written demand by the Contracting Officer, and September 9, 1949, when plaintiff formally demanded the payment of the balance due on the contract price, "plaintiff engaged in negotiations for the revision of the price of the contract and we have so found. Finding 39(e). . . . and it is therefore estopped to assert the failure of the Contracting Officer to perform the condition precedent of making formal written demand to negotiate" (R. 56).

Because of this holding that plaintiff was estopped to assert the failure of the Contracting Officer to perform the condition precedent to plaintiff's conditional contractual obligation to negotiate to reduce the contract price, the Court of Claims ruled that the plaintiff could not recover in this action the unpaid balance of the contract price.

Specifications of the Errors to Be Urged

1. That the Court of Claims erred in ruling that as a matter of law plaintiff was estopped to recover the unpaid balance of the contract price because, on the basis of the Court of Claims finding of facts, this ruling does not give proper effect to applicable decisions of the Supreme Court

of the United States on this question of law and is in conflict therewith.

2. That the Court of Claims erred in finding as an ultimate fact that plaintiff engaged in negotiations for the reduction of the contract price because

(a) this finding of ultimate fact (Finding 39(2)) is without supporting evidence as shown by the testimony and exhibits disclosed in the Court of Claims findings and is in conflict therewith (Findings 32; 33(a); 33(c); 34(a); 35; and 36); and

(b) this finding of ultimate fact is also in conflict with other findings of ultimate fact (Findings 39(a), (b), (c) and 41(b)).

Reasons for Granting the Writ

The petitioner asserts that a writ of certiorari should be granted in this cause under subdivision 5 of Rule 38 of this Court because the Court of Claims has failed to give proper effect to applicable decisions of this Court and has rendered a decision in conflict therewith in the increasingly important field of federal contract law; that is to say, the Court of Claims has erroneosuly held that the United States as a party to a contract may successfully assert the defense of equitable estoppel in an action at law brought against it by the contractor to recover the unpaid balance of the contract price, even though the United States was not induced by the contractor's action or inaction to change its position and to act to its prejudice in any way with respect to the contract or the contract price.

This Court has held that the United States is bound by the same principles that govern individuals in their relation to contracts and litigations thereon and should not be treated as a favored litigant. With respect to private individuals in such contract litigation, this Honorable Court

has uniformly held through a long line of decisions that estoppel does not arise in such a case as this unless the party asserting it has been induced by the other party to change its position and to act to its prejudice in consequence of the inducement.

Deitrich v. *Greaney*, 309 U. S. 190, 197 (1939);
Ashwander v. *T. V. A.*, 297 U. S. 288, 323 (1935);
Arizona v. *Copper Queen Mining Co.*, 233 U. S. 87, 95 (1914);
Wiser v. *Lawler*, 189 U. S. 260, 270 (1902);
Bloomsfield v. *Charter Oak Bank*, 121 U. S. 121, 135 (1887);
Leather Mfg. Bank v. *Morgan*, 117 U. S. 97, 108 (1885);
Kirk v. *Hamilton*, 102 U. S. 68, 77 (1880);
Dickerson v. *Colgrove*, 100 U. S. 578, 589 (1879);
Jones v. *United States*, 96 U. S. 24, 29 (1877);
Ketchum v. *Duncan*, 96 U.S. 659, 666 (1877);
Insurance Co. v. *Wilkinson*, 80 U.S. 222, 233 (1871);
Railroad Co. v. *DuBois*, 79 U.S. 47, 64 (1870);
Gregg v. *Von Phul*, 1 Wall. 274, 281 (1863).

The great importance of the preservation of uniformity between the decisions of the Court of Claims, of the Federal Courts, and of the Supreme Court of the United States in the field of the federal law of contracts and estoppel, calls for the exercise of this Court's power of supervision in this case.

It is further asserted that in the discharge of its very important judicial function of adjudicating the valuable contract and property rights of the plaintiff in the case the Court of Claims should not be allowed to depart from accepted judicial procedures by making an arbitrary and capricious finding which is not only unsupported by the evidence as is disclosed in its findings in this case, but which is actually in conflict therewith, as well as being in conflict

with other findings of ultimate fact. This situation, as reflected in this case, also calls for the exercise of this Court's power of supervision in the interest of sound judicial administration of justice in the nationally important field of government contract litigation over which the Court of Claims has been given jurisdiction.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Argument

I. *The rule established by the Supreme Court in the long line of decisions herein cited, that the defense of equitable estoppel in an action at law is not available to a party unless he has been induced by the other party to change his position to his prejudice, is applicable to the instant case, and the Court of Claims erred in not recognizing this principle.*

The Court of Claims made the following findings of ultimate fact:

> "40. . . . The failure of the Contracting Officer to make the written demand was not induced by any act (of omission or commission) on the part of plaintiff." (R. 81)
>
> "41(c) Neither plaintiff's attitude, nor its actions or expressions, relating to negotiation for price revision prior to September 9, 1949, induced any action or change of position by the Contracting Officer pertaining thereto." (R. 81)

Having found these ultimate facts, there can be no estoppel in this case under Supreme Court decisions. These cases all agree that there can be no estoppel unless the party who alleges it relied upon the other party's action or inaction, was induced to act by it, and did take some action which changed its position to its prejudice. The above quoted findings expressly and affirmatively show that

no such factual circumstances existed in this case justifying the application of equitable estoppel to defeat plaintiff's legal right to the contract price.

This Court held in a very carefully considered opinion in *Dickerson* v. *Colgrove,* 100 U. S. 578 (1879) that equitable estoppel was an available defense to an action at law, but only where the facts show that the party asserting the estoppel has been induced by the other party to change his position to his prejudice.

> "The vital principle is that he who by his language or conduct *leads another to do what he would not otherwise have done,* shall not subject such person to loss or injury by disappointing the expectations *upon which he acted.*" (p. 580) (Emphasis supplied)

In the case of *Jones* v. *United States,* 96 U. S. 24 (1877), this Court held:

> "Estoppel does not arise in such a case unless the party for whom the service is to be performed induced the other party by some means to change his position and to act to his prejudice in consequence of the inducement. . . ." (p. 29)

In *Leather Manufacturers Bank* v. *Morgan,* 117 U. S. 97 (1885), this Court held:

> "The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the consideration of the question before us, aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan* v. *Railroad Co.,* 96 U. S. 716, 720, it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, *if the latter has acted upon that belief.*" (p. 108—emphasis supplied.)

In *Bloomfield* v. *Charter Oak Bank,* 121 U. S. 121 (1887) this Court held:

> "And no estoppel in pais can be created, except by conduct which the person setting up the estoppel has the right to rely upon, *and does in fact rely and act upon. Burgess* v. *Seligman,* 107 U.S. 20; *Scovill* v. *Thayer,* 105 U.S. 143; *Brant* v. *Virginia Co.,* 93 U.S. 326." (p. 135—emphasis supplied.)

These rulings of the Supreme Court on this fundamental principle of estoppel are in accord with all the applicable cases on the subject, as is recognized by the two leading authorities. Thus, in *Bigelow on Estoppel* (6th Ed.), p. 694, it is stated:

> "The rule is fundamental that unless the representation of the party estopped has also been really acted upon—the other party acting differently, that is to say, from the way he would otherwise have acted, so that to deny the representation would prejudice him—no estoppel arises."

and in 2 Pomeroy's Equity Jurisprudence (4th Ed.), § 812, it is stated:

> "Whatever may be the real intention of the party making the representation, it is absolutely essential that this representation, whether consisting of words, acts, or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that so relying upon it and induced by it, he should take some action. The cases all agree that there can be no estoppel unless the party who alleges it relied upon the representations, was induced to act by it, and thus relying and induced, did take some action. Finally, this action must be of such a nature that it would have altered the legal position of the party for the worse, unless the estoppel is enforced."

The United States, of course, as a party to contract suit is not a favored litigant but is bound by the same principles that govern individuals in such litigation. *Pierce* v. *U.S.,* 7 Wall. 666, 75 L.Ed. 169 (1869). The principle established

by the Supreme Court in the above cases, that the defense of equitable estoppel in an action at law is not available to a party unless he has been induced by the other party to change his position to his prejudice, is, therefore, applicable to the United States as the defendant in the instant case.

In the case at bar, therefore, the Court of Claims has erroneously failed to apply this principle of these applicable decisions of the Supreme Court and has rendered a decision in conflict therewith in holding as a matter of law that the defense of equitable estoppel was available to the defendant.

The only United States Supreme Court decision cited by the Court of Claims in support of its ruling of estoppel (*Simmons* v. *Burlington, Cedar Rapids & Northern Railway Co.*, 159 U.S. 278) did not even involve the principle of estoppel as a defense in an action at law, but was a ruling based on the principle of laches as depriving a petitioner in an equity suit of the extraordinary equitable relief sought. The distinction between the two principles was clearly brought out by the Supreme Court in *Wehrman* v. *Conklin*, 155 U. S. 314 (1894), where it held:

> "Though a good defense in equity, laches is no defense at law. If the plaintiff at law has brought his action within the period fixed by the statute of limitations no court can deprive him of the right to proceed. . . . such delay may properly be considered by the jury *in connection with other facts* tending to show an estoppel" (p. 327—emphasis supplied).

II. *The finding of ultimate fact by the Court of Claims that plaintiff engaged in negotiations for the reduction of the contract price is without supporting evidence and in conflict with its other findings.*

On the question of fact of whether the plaintiff ever engaged in negotiation for the revision of the price of Con-

tract ac 76 the Court's finding of ultimate fact was directly contrary to the Commissioner's.

The Court found:

> "39(e) Plaintiff engaged in negotiations for the revision of the price of Contract ac 76, within the meaning of Article 40." (R. 81)

The Commissioner found:

> "39(e) Plaintiff never engaged in negotiations for the revision of the price of Contract ac 76, within the meaning of Article 40." (R. 46)

Both of these findings of ultimate fact are based on exactly the same primary findings which disclose the evidence on this question of fact. These primary findings were made by the Commissioner and adopted by the Court without change. These primary findings and the evidence disclosed therein support the Commissioner's finding of ultimate fact that plaintiff never engaged in such negotiations and none of them support the Court's finding of ultimate fact to the contrary and are in conflict therewith.

The Court found that between December 25, 1948 and September 9, 1949 the plaintiff and Contracting Officer were engaged in negotiations to reduce the contract price under Article 40. The evidence disclosed in these primary findings, however, shows without contradiction that these negotiations were never commenced and it was so understood by both parties, the Contracting Officer and the plaintiff.

These are the primary findings:

> Finding 32—"On February 9, 1949, the Contracting Officer advised the Auditor General that 'This office has conducted a preliminary review of the contractor's costs . . . *in an effort to lay the basis for negotiation of a revised price* under the Price Redetermination Article. . .'." (R. 74)

Finding 33(a)—"On February 14, 1949, the Contracting Officer wrote plaintiff: '. . . nor would it be equitable to the contractor for the purpose *to attempt to negotiate a revised price on the information* elicited to date'." (R. 74)

Finding 33(c)—"On March 3, 1949, the Contracting Officer again wrote plaintiff: 'The decision to require an audit, *in order to lay the basis for the proper negotiation of a revised over-all price for the contract* was reached with some reluctance . . . since this contract has long since been completed, the audit assistance is in no way related to performance of the contract . . .'." (R. 76)

Finding 34(a)—"The audit of plaintiff's costs for Contract ac 76 was begun on April 18, 1949, and completed on August 9, 1949." (R. 77)

Finding 35—"On July 25, 1949, Watson wired plaintiff that the auditor's report on Contract ac 76 was expected soon and suggested that negotiation conferences be scheduled regarding Contract ac 76. . . . (R. 78)

"A conference was scheduled accordingly, and was held at plaintiff's offices on August 23, 1949." (R. 78)

Finding 36—At this conference "discussion of the auditor's report ensued, until it became apparent that plaintiff's accountant had not had sufficient opportunity to study the report to be familiar with its contents. The conference was thereupon adjourned, subject to being reconvened after plaintiff's accountant had received the auditor's report. (R. 78)

"The conference was never reconvened." (R. 79)

Finding 39(a)—"Plaintiff and Contracting Officer both considered the determination of properly allowable costs of performance of the contract *as a step preliminary to the negotiation of a revised price. The Contracting Officer expected to use the costs so determined as the basis of the negotiation.*" (R. 80)

Finding 39(b)—"The auditor's report of plaintiff's costs of performing the contract was taken to the conference of August 23, 1949 by the Contracting Officer, with the expectation that plaintiff would object and ex-

cept to portions thereof. The Contracting Officer intended to hear and consider such objections and exceptions; . . ." (R. 80)

Finding 39(c)—"The conference of August 23, 1949, never reached the stage of discussing plaintiff's objections and exceptions to the auditor's report." (R. 80)

Finding 37—"On September 9, 1949, plaintiff's president wrote the Contracting Officer:

> At our recent conference we attempted to discuss with you the provisions of the contract relating to renegotiation of the price, but without much satisfaction. We therefore thought it advisable to consult our attorney as to the proper legal construction of these provisions in the light of the facts. As you know, after completion of the contract we transmitted to you, under date of November 24, 1948, a detailed statement of the costs of performing this contract. We did not receive from you, within thirty days after our submission of such statement, any written demand that we negotiate to reduce the contract price. In fact, the first written reference on your part to renegotiation appears to have been in your letter of 14 February 1949, in which you advised us that you had requested an audit as a basis for future renegotiation.
>
> • • • • • • •
>
> Accordingly, we submit herewith an invoice in quadruplicate, summarizing amounts heretofore invoiced, amounts heretofore paid, and the balance now invoiced." (R. 79)

Finding 38(a)—"Plaintiff has never altered the position taken by it in the letter quoted in the preceding finding in any subsequent correspondence or conference with Watson concerning Contract ac-76.

(b) The Contracting Officer has never treated the parties' 'failure to agree' to a revised price as a 'disagreement as to a question of fact' to be 'disposed of in accordance with Article 12 (Disputes).' The Con-

tracting Officer has made no decision in writing pursuant to Article 12 of Contract ac-76." (R. 89)

While not disclosed in any of the findings, the Commissioner and the Court also had before them the Contracting Officer's reply to plaintiff's letter of September 9, 1949, as set forth above in Finding 37, in which he too acknowledged the fact that there had been no negotiations (letter of September 13, 1949 from Contracting Officer to plaintiff—Plaintiff's Exhibit 42) stating,

> "A review of the prior correspondence regarding the subject matter will disclose that at no time was there any attempt to renegotiate the price. All of the proceedings to date have been an attempt to learn the cost of performance of the contract."

It is obvious, therefore, notwithstanding the fact that it adopted without change or addition all of the Commissioner's primary findings which completely supported his finding of ultimate fact that "Plaintiff never engaged in negotiations . . ." that the Court of Claims, arbitrarily and without any supporting evidence, merely deleted the word "never" from the Commissioner's Finding 39(e), thereby coming to the directly opposite and contradictory conclusion. This ultimate finding of the Court of Claims is also in conflict with and contradicted by its finding of ultimate fact in Finding 41(b) that during the period of time in question the plaintiff was merely "ready and willing to engage in negotiations for price revision . . ."

Conclusion

WHEREFORE, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Claims, and that upon such review the judgment of said Court of Claims

be vacated, reversed and set aside, and that judgment be entered for the plaintiff in the stipulated amount ($188,325.83) of the unpaid balance of the contract price.

BOLLING R. POWELL, JR.,
Counsel for Petitioner.

(1838)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	9
Conclusion	15

CITATIONS

Cases:

American Ry. Express Co. v. *Thompson*, 184 Ark. 898, 43 S.W. 2d 750	12
Callahan Construction Co. v. *United States*, 91 C. Cls. 538	11
DiFrancesco v. *Zurich Ins. Co.*, 105 Conn. 162, 134 A. 789	12
District of Columbia v. *Camden Iron Works*, 181 U.S. 453	10
Insurance Co. v. *Norton*, 96 U.S. 234	10, 12
Jones v. *United States*, 96 U.S. 24	12
Mahoning Investment Co. v. *United States*, 78 C. Cls. 231, certiorari denied, 291 U.S. 675	12
Maryland Steel Co. v. *United States*, 235 U.S. 451	10
Salomon v. *United States*, 19 Wall. 17	10
Sanitary District v. *Chicago T. & T. Co.*, 278 Ill. 529, 116 N.E. 161	12
Stewart v. *Griffith*, 217 U.S. 323	10
Thompson v. *United States*, 91 C. Cls. 166	11
Ward v. *Day*, 4 Best & Smith 335	12
Wheelock v. *Postal Telegraph Cable Co.*, 197 Mass. 119, 83 N.E. 313	12
Williams v. *Bank of United States*, 2 Pet. 96	10

Miscellaneous:

Restatement of Contracts:

§ 88	13
§ 88, comment b	11
§ 88, comment c	12
§ 88(1)	10, 11
§ 88(2)	11
§ 294, comment b	13
§ 297	11, 12
§ 308	11

3 Williston on Contracts (Rev. Ed.):

§ 689	11
§ 693	11

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 482

HARVEY RADIO LABORATORIES, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 47-81) is reported at 115 F. Supp. 444.

JURISDICTION

The order of the Court of Claims, remanding the case to a commissioner for further proceedings, was entered on October 6, 1953 (R. 47, 56). The petition for a writ of certiorari was filed on November 27, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner has waived the contracting officer's failure to make a written demand for negotiation, provided for in Article 40 of the contract, so as to require petitioner to negotiate to reduce the contract price to an amount representing fair and reasonable compensation for the performance of the contract.

STATEMENT

Petitioner brought this suit in the Court of Claims to recover an amount alleged to be due to it under a Government contract pursuant to which petitioner was to design, develop, and manufacture a new kind of radar equipment and provide certain engineering reports concerning the work performed.[1] The contract (which the court below refers to as "ac-76") provided for partial payments to petitioner as the work progressed, not exceeding 80 per cent of the total price (R. 62-63), and also provided in Article 40 (R. 63):

> (a) Within sixty days after the completion or termination of this contract, the Contractor will submit to the Contracting Officer a detailed statement of the costs of performing this contract. Upon the written demand of the Contracting Officer, made at any time within thirty days after the submission of such statement, the Contractor will negotiate to

[1] The complaint seeks $188,325.83 alleged to be unpaid under the contract, plus damages in excess of $500,000 for impairment of credit assertedly flowing from depriving petitioner of working capital (R. 6).

> reduce the contract price to an amount representing fair and reasonable compensation for the performance of the contract. * * *

The single issue of whether Article 40 had become operative was severed from the rest of the case and tried alone, the other issues being saved for future determination (R. 57, fn. 5). The facts as found by the court below may be summarized as follows:

When the contract work was first discussed, there was insufficient data upon which either the petitioner or the Government, acting through its Watson Laboratories of the Air Technical Service Command, Army Air Forces, could accurately estimate the cost of the work, for it involved research and required an examination of hundreds of crates of stored Army equipment for possible use under the contract (R. 57-58). The use of cost-plus-fixed-fee contracts was then contrary to Army Air Force policy (R. 58). In April 1946, the parties entered into a letter contract under which the Government placed its order for the work, directed that it begin immediately, and authorized the expenditure of moneys to carry it forward (R. 7-9, 59). Throughout 1946 and into 1947, work proceeded under the letter contract which, by its terms, contemplated that the parties would later execute a more definitive contract (R. 8, 59). During this period, petitioner submitted cost data to Watson (R. 59). A definitive fixed-price contract in the amount of $1,146,780.54, superseding the letter contract, was executed February 12, 1947 (R. 60-61). This contract provided that the prices specified

were subject to revision in accordance with the terms of its Article 40 (R. 15, 49).

Operating on limited capital, petitioner relied heavily on the partial payment provisions of the contract and arranged with Watson that certain items normally classified as indirect or overhead expenses would, for the purposes of this contract, be treated as direct costs (R. 58, 59, 64). In April or May 1947, however, the auditing of petitioner's partial payment invoices was transferred from Watson to the Boston Branch, Army Audit Agency (R. 64), and Boston Branch refused to allow any overhead or indirect expenses to be charged as direct costs without a formal modification of the contract (R. 67-68). Such a modification was never made. The disallowance of these items caused delay in the payment of petitioner's invoices and, in the succeeding months, petitioner complained repeatedly (R. 64-68), asserting that such disallowance was without justification since the price was subject to "downward revision" and "redetermination" anyway, and would ultimately result in extensive revisions and delay in final settlement (R. 66-68).

On April 9, 1948, petitioner wrote to Watson saying that it expected to complete the contract work very shortly. The letter called attention to the price revision clause of the contract and stated that it was "necessary that very early action be taken to initiate the necessary steps to have this price revision accomplished" (R. 69). On May 7, 1948, Watson replied that its Price Analysis

Staff would contact petitioner soon to arrange for "action necessary under the price clause" (*id.*). On May 13, 1948, Watson wrote petitioner requesting the cost data "in accordance with Article 40 of subject contract calling for price revision by mutual agreement" (R. 69-70). On May 18th petitioner answered that the cost information would be forwarded as soon as all work was completed and that it was hoped "that a mutually agreeable final price determination can be accomplished without undue delay" (R. 70).

At this time, petitioner was primarily concerned with settling the contract so as to clarify, if not strengthen, its financial position (R. 71). Both parties were aware that the contract contained a price redetermination provision, but neither had reviewed the specific terms of Article 40; petitioner assumed that Watson would do whatever was necessary to invoke the provision for price revision, and Watson assumed that petitioner would negotiate to reduce the price without written demand to do so (R. 50, 71). These understandings and intentions remained unchanged from May 1948 to September 1949 (*id.*).

On November 24, 1948, in purported compliance with the requirement of Article 40 that a detailed statement of costs be submitted within 60 days of the completion of the contract, petitioner sent Watson detailed information and wrote that it was "particularly interested in completing any final price negotiation under this contract prior to the end of the current fiscal year" (R. 72-73).

The contracting officer did not, either within 30 days or at any other time after the submission of such cost information, make written demand of petitioner to negotiate to reduce the contract price (R. 73).

Preliminary examination of the cost data submitted indicated to the contracting officer (1) that petitioner had been overpaid on the contract in that it had received $37,027.47 in excess of the listed costs plus profit, and (2) that there was a possibility of fraud on the part of petitioner (R. 73). On February 9, 1949, the contracting officer advised the Auditor General that petitioner's costs had been reviewed in an effort "to lay the basis for negotiation of a revised price," but that there appeared to be serious errors in petitioner's books and that additional information was needed; he requested that a detailed audit be made of petitioner's costs, adding that the contract had been completed about November 30, 1948 (R. 73-74). On February 14, 1949, the contracting officer wrote petitioner that the cost information had been studied "in an effort to expedite the redetermination of the contract price," that the preliminary review had not produced enough information "to adequately protect the interests of the Government nor would it be equitable to the contractor * * * to attempt to negotiate a revised price on the information elicited to date," that the Auditor General had been requested to conduct an audit to determine all costs of the contract, and that, pending receipt of his report, "it is suggested

that further negotiations be held in abeyance" (R. 74).

Petitioner's reply, dated February 23, 1949, contained no intimation that the right to redetermine the price was lost by failure to send notice; instead, petitioner expressed surprise over the need for a detailed audit, acknowledged the contracting officer's right to require the audit for purposes of price redetermination, requested reconsideration of the matter, but pledged cooperation if it should be held (R. 75, 52).[2] The contracting officer answered on March 3 that the decision to require an audit "in order to lay the basis for the proper negotiation of a revised over-all price for the contract" had been reached reluctantly but with great objectivity (R. 76).

The audit began on April 18, 1949, and was completed August 9, 1949 (R. 77). Late in July, Watson wired petitioner that the auditor's report was

---

[2] The letter stated in part (R. 75-76, 52): "A complete breakdown of costs * * * was forwarded to you during November 1948, with the request * * * [for] * * * a final negotiated settlement prior to our fiscal closing * * * for the year 1948. Original commitments from your office indicated that the entire matter could be closed prior to December 31, 1948, and on or about the middle of December, we were advised that final negotiations would be delayed until January 22nd. It was the opinion of your office that a final negotiated settlement by this date would still permit us to incorporate the final results of negotiation into year-end audit adjustments prior to the publication of our year-end statements. With these understandings I was convinced that a mutually agreeable settlement [as to the contract price] could be accomplished before the end of January 1949. * * * The Contracting Officer has a right to require a detailed audit, and should this be your final decision * * * this company will cooperate to the utmost * * *." (Words in brackets were inserted by the court below.)

expected soon and suggested that "negotiation conferences" be scheduled (R. 78). A conference for price revision negotiation was held at petitioner's office on August 23, 1949, but, after some discussion, the meeting was adjourned in order to allow petitioner's accountant time to study the audit report (R. 78-79, 52-53).[3] The conference was never reconvened for, on September 9, 1949, petitioner wrote the contracting officer that its attorney had advised that since there had been no written demand, pursuant to Article 40(a) of the contract, for negotiation of the price within 30 days after submission of its cost data on November 24, 1948, petitioner was under no obligation to negotiate, and the contract had become a fixed-price contract (R. 79-80). Demand was made for the unpaid balance (R. 80).

The court below also found that the contracting officer's failure to make written demand to negotiate for price revision was not induced by any act of petitioner, but that petitioner had in fact engaged in negotiations for revision of the price within the meaning of Article 40; that petitioner was ready and willing to do so until September 9, 1949, and the contracting officer so understood from

---

[3] During the discussion, petitioner's president had occasion to refer to the terms of the contract. By some mischance, he was handed a preliminary draft of the contract which did not contain provisions for price redetermination. Believing this was the final contract he asserted that the contract was for a fixed-price, that there was no requirement for price redetermination, and that Watson owed the unpaid balance of the contract price. When shown the actual contract with its Article 40, he nevertheless maintained it was a fixed-price contract. (R. 78-79, 52-53.)

petitioner's actions and expressions; and that petitioner's actions had not induced any change of position by the contracting officer relating to negotiation for price revision (R. 81).

On the basis of these facts the Court of Claims held that the repricing provisions of Article 40 had become operative, that the conclusion was "inescapable that the parties were engaged for a period of some nine or more months in negotiations leading up to and looking toward an ultimate revision of the price"; that petitioner had acquiesced in these proceedings and was therefore estopped from asserting the contracting officer's failure to make written demand to negotiate (R. 56). Accordingly, the court remanded the case to a commissioner for such further proceedings as might be necessary (R. 56, 81).

ARGUMENT

The only question sought to be raised in this case is whether petitioner's conduct constituted a waiver of the written-demand provision of Article 40 of the contract. The answer depends entirely upon the particular facts of this case. Petitioner does not contend that the principles involved are unsettled, nor that their application to a clause such as is contained in this contract presents novel problems recurring in other litigation. On the contrary, review is sought on the grounds merely that in this one instance settled legal principles were not applied correctly to the particular facts of this case and that the particular fact findings of the court below are not supported by the evidence. We be-

lieve that petitioner is in error on both phases, that the decision below is clearly correct, and that, in any event, review of the case can be of no special importance beyond the particular facts involved. Hence, there is no warrant for the grant of certiorari particularly at this interlocutory stage of the proceeding.[4]

1. It is settled that strict performance of a contract by one party may be waived by the other party. The rule applies to conditions precedent. A party "always has the option to waive a condition or stipulation made in his own favor." *Insurance Co.* v. *Norton,* 96 U. S. 234, 240; *Stewart* v. *Griffith,* 217 U. S. 323, 329. "If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with * * * the performance, the opposite party is excused from proving a strict compliance with the condition." *Williams* v. *Bank of United States,* 2 Pet. 96, 102; and see *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453, 461-462.

Such a waiver may be made either before or after the date on which performance of the condition precedent is due. *Insurance Co.* v. *Norton,* 96 U. S. at 241; *Restatement of Contracts,* § 88(1); cf. *Salomon* v. *United States,* 19 Wall. 17; *Maryland Steel Co.* v. *United States,* 235 U. S. 451. If the waiver occurs before such date, the promisor can reinvoke the condition by advising of his inten-

---

[4] Further proceedings are necessary prior to final adjudication of all the issues.

tion to do so, provided, however, that there has been no substantial change of position by the other party and that there is still reasonable time to fulfill the condition. *Restatement of Contracts,* §§ 88(2), 297, 308. Thus, when the promisor indicates, by words or conduct, that he will not avail himself of the excuse of non-performance of the condition to escape his own obligation and the promisee, in reliance thereon, fails to perform the condition within the time when it is possible to do so, the promisor is thereafter estopped from asserting non-performance of the condition as a defense under the doctrine of promissory estoppel. 3 Williston on *Contracts* (Rev. Ed.), § 689.

Where, however, the promisee without excuse fails to perform the condition (that is, where the promisor has not misled him), and subsequently the promisor nevertheless undertakes expressly or impliedly not to take advantage of the breach of condition, such undertaking will still bind the promisor provided that fulfillment of the condition was not a substantial element in inducing the formation of the contract. *Restatement of Contracts,* § 88(1). While this may not be a true promissory estoppel because of the absence of any reliance upon an action by the promisor, it is a new promise to perform despite non-fulfillment of the condition and is treated as a binding waiver. *Ibid., Comment b;* 3 Williston on *Contracts* (Rev. Ed.), § 693; cf. *Thompson* v. *United States,* 91 C. Cls. 166, 179; *Callahan Construction Co.* v. *United States,* 91 C. Cls. 538, 610-611; *Mahoning Investment Co.* v.

United States, 78 C. Cls. 231, 247, certiorari denied, 291 U. S. 675.[5] The promisor may waive by merely indicating his intention to perform despite nonperformance of the condition by the promisee (*Restatement of Contracts*, § 88, *Comment c; id.*, § 297), and the question whether there has been a waiver is simply one of fact. Cf., *Insurance Co.* v. *Norton*, 96 U. S. 234, 240.[6]

2. Application of these well settled principles to the facts of this case clearly required the conclusion reached by the Court of Claims. Article 40 of the contract, titled "Price Revision" (R. 18), required petitioner to submit a detailed statement of the costs of performing the contract within 60 days of is completion (R. 63). This obligation was absolute, not subject to written demand, and obviously looked only toward price revision, for which it was a necessary preliminary. The Article further provided that, upon written demand made within 30

---

[5] In *Insurance Co.* v. *Norton*, 96 U. S. at 243, this Court discussed with approval the decision in *Ward* v. *Day*, 4 Best & Smith 335, where, after a licensee had forfeited his right to gather minerals from the land, the landlord entered into negotiations with the licensee to grant a renewal of the license when it should expire. It was held that, by entering into these negotiations, the landlord waived the forfeiture of the original license. The negotiations assumed that the original license was to continue to its termination. And see, *American Ry. Express Co.* v. *Thompson*, 184 Ark. 898, 43 S. W. 2d 750; *DiFrancesco* v. *Zurich Ins. Co.*, 105 Conn. 162, 134 A. 789; *Sanitary District* v. *Chicago T. & T. Co.*, 278 Ill. 529, 547-548, 116 N. E. 161, 168; *Wheelock* v. *Postal Telegraph Cable Co.*, 197 Mass. 119, 124-125, 83 N. E. 313, 314-315.

[6] The cases cited by petitioner (Pet. Br. pp. 5, 7) do not relate to factual situations involving the waiver of a condition precedent in a contract and therefore are not applicable here. But see, *Jones* v. *United States*, 96 U. S. 24, 28.

days after submission of the statement,[7] petitioner would negotiate to reduce the contract price. The sending of the written demand can hardly be regarded as any part of the agreed exchange for petitioner's promise to redetermine the price; it was only a procedural condition setting the time within which the contracting officer should give notice of his desire to revise the price.[8] This is the very kind of condition as to which there may be a binding waiver despite the absence of a new consideration or of prior reliance. *Restatement of Contracts,* § 88; *id.,* § 294, *Comment b.*

That there has been a binding waiver is clear from the facts as found by the Court of Claims. It may well be that petitioner waived the requirement of written demand even before it submitted its cost statement, for as early as April 9, 1948, petitioner wrote requesting "early action * * * to initiate the necessary steps to have this price revision accomplished" (R. 69), thereby manifesting its recognition of the contracting officer's intention to revise the contract price. The Government's replies of

---

[7] There is some question whether petitioner had fully complied with this provision, since the audit by the Government's accountants revealed inaccuracies in the figures submitted. Until accurate figures were available, petitioner could not be said, we believe, to have fulfilled its obligation under Article 40. Only when petitioner had fully discharged its duties could the Government's obligation to make written demand come into play.

[8] There can be no doubt on the facts that beginning with the execution of the contract, if not before, and continuing through its performance, petitioner was aware that because of the nature of the contract the contract price was in effect tentative only and that the price would necessarily have to be revised in light of the experience under the contract.

May 7 and 13 (R. 69-70) indicated a willingness to comply with the request. But irrespective of whether a waiver occurred at this early date, a waiver certainly occurred after the submission of the cost data, for at that time and thereafter until almost a year after the contract was completed petitioner actively cooperated in preliminary negotiations looking toward a price revision. Petitioner promised assistance in developing more detailed cost information for purposes of negotiating a price revision (R. 75, 52), permitted a thorough audit of its books to that end (R. 77), and participated in discussions for that purpose (R. 78-79). As stated by the court below, "The conclusion seems inescapable that the parties were engaged for a period of some nine or more months in negotiations leading up to and looking toward an ultimate revision of the price of contract ac-76 under the provisions of Article 40" (R. 56). This constituted a waiver of the requirement that written demand to negotiate be made.[9]

---

[9] Petitioner's argument attacking the findings on this point (Pet. Br. 9-13) rests upon a purported distinction between (a) negotiations seeking to lay the basis for negotiations of a revised price, and (b) negotiations for revising the price. The language of Article 40 affords no warrant for such hair splitting. Everything the parties did after the submission of the cost statement in November, 1948, was aimed at price revision, and clearly the court's finding that petitioner actually engaged in negotiations for redetermining the price within the meaning of Article 40 (R. 81) is supported by the evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
LESTER S. JAYSON,
Attorneys.

JANUARY, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE 1954 254811 749